UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 24

Docket No. PH-0752-11-0212-I-1

Timothy Allen Downey,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 29, 2013

Benjamin Palewicz, Esquire, Baltimore, Maryland, for the appellant.

Julie Rebecca Zimmer, Esquire, Baltimore, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that sustained the charge of sleeping on duty, did not sustain the charge of intimidating fellow employees, and affirmed his removal. For the following reasons, we GRANT his petition for review, AFFIRM the administrative judge's decision not to sustain the intimidating fellow employees charge, VACATE the portion of the initial decision that sustained the sleeping on duty charge and

affirmed the penalty, and REMAND for further adjudication consistent with this Opinion and Order.[1]

BACKGROUND

¶2 The appellant, a Health Technician for the VA Maryland Health Care System, was removed, effective February 14, 2011, for the charges of sleeping on duty and intimidating fellow employees. Initial Appeal File (IAF), Tab 5, Subtab 4B. After a hearing, the administrative judge sustained only the sleeping on duty charge. IAF, Tab 21, Initial Decision (ID). The administrative judge found that the agency had demonstrated a nexus between removal and the efficiency of the service based on this charge. ID at 6-7. She also found that the appellant failed to demonstrate that the agency had committed harmful procedural error because the agency gave him clear notice of the charges and he had an adequate opportunity to present a reply that the deciding official considered. ID at 7-8. Finally, the administrative judge evaluated whether removal was reasonable given that she sustained fewer than all of the agency's charges. ID at 8-11. With respect to the appellant's disparate penalties argument, the administrative judge found that the charges and circumstances surrounding the charged behavior of the other employees were not substantially similar to the appellant's charge of intimidating a fellow employee and sleeping on duty. ID at 10. She also concluded that removal was not beyond the bounds of reasonableness for the charge of sleeping on duty. ID at 9-11.

¶3 In his petition for review, the appellant argues that the administrative judge erred in upholding the charge of sleeping on duty and that the agency unjustifiably penalized him based on the premise that he endangered patient

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

safety. Petition for Review (PFR) File, Tab 6 at 4-11. He also argues that the agency erroneously imposed a higher penalty based on the deciding official's determination that his act of sleeping was "deliberate." *Id.* at 11-12. Finally, he asserts that the administrative judge failed to appropriately consider his disparate penalties argument and his evidence that another employee who fell asleep while on duty and engaged in other misconduct only received a 3-day suspension. *Id.* at 12-13. The agency has filed an opposition, arguing that the appellant has presented no argument or evidence to warrant granting the petition for review. PFR File, Tab 8. For the following reasons, we vacate the portion of the initial decision that sustained the sleeping on duty charge and affirmed the penalty, and we remand for further consideration and analysis of this charge and the reasonableness of the penalty.

ANALYSIS

We remand for further findings concerning the agency's charge of sleeping on duty.[2]

¶4 A charge usually consists of two parts: (1) a name or label that generally characterizes the misconduct; and (2) a narrative description of the act that constitutes the misconduct. *Brott v. General Services Administration*, 116 M.S.P.R. 410, ¶ 10 (2011). When an agency names a charge so that the label has more than one element, then the agency must prove all of the elements for the overall charge to be sustained. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). The agency labeled its charge against the appellant as "sleeping on duty" and supported it with the following narrative:

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[2] The agency does not challenge the administrative judge's finding that the agency failed to meet its burden of proof with respect to the intimidating fellow employees charge, and we discern no error in the administrative judge's decision not to sustain the charge. Additionally, we discern no reason to disturb the administrative judge's finding that the agency did not commit harmful procedural error, and the appellant does not contest this finding on review. Thus, the administrative judge may incorporate these findings in her new initial decision.

> At approximately 11:00 a.m. on November 1, 2010 you were found sitting in a chair on unit 3A Room 117 with your eyes closed, in a dark room, with the TV on. When asked about the situation you were found in, you did not deny that you had been sleeping. Later that day, you even said to Ms. Diana DeJesus-Stinnette, "you should have woken me up." You had been away from your station for over 1.5 hours. You have been found in a similar state on duty before by the Charge Nurse, Jerry Tuveson, RN. Your absence from the floor jeopardized the safety [of] the patients charged to your care, and compromised the organization's mission to deliver safe patient care.

IAF, Tab 5, Subtab 4D.

¶5 It is undisputed that the appellant was found sleeping in a patient room at 11:00 a.m. on November 1, 2010, during his scheduled shift. Hearing Transcript, Volume 1 (HT1) at 160-61, 163, 188 (testimony of the appellant). Further, it is undisputed that he confronted Ms. DeJesus-Stinnette about reporting him to Nurse Manager Richard Henderson and that he was found asleep in a prior incident. HT1 at 170-73, 193-94 (testimony of the appellant); IAF, Tab 5, Subtab 4D. The administrative judge made no findings concerning the duration of the appellant's absence from his station and whether he was actually "on duty" during that time. The appellant argues that the agency failed to demonstrate that he was on duty when he was caught sleeping in a vacant patient room because there was "no evidence to show that [the appellant] was not on a break or that he had exceeded his allotted break time." PFR File, Tab 6 at 6.

¶6 Whether the appellant was on break and, if so, whether he exceeded his allotted break time were both contested during the hearing. According to the appellant, he was taking an authorized break when he inadvertently fell asleep. HT1 at 160, 164 (testimony of the appellant). The appellant testified that he was only absent from his duty station for 20-25 minutes, and Ms. DeJesus-Stinnette, the agency's witness, testified that employees frequently combined their two 15-minute breaks with their 30-minute lunch break for a total break of 1 hour. HT1 at 153-54, 164 (testimony of the appellant); Hearing Transcript, Volume II at 220-21 (testimony of Ms. DeJesus-Stinnette). Other agency witnesses testified

that the appellant was absent from his station for 1.5 hours and that employees may not combine breaks. HT1 at 56 (testimony of Mr. Henderson), 105, 107 (testimony of deciding official Dennis H. Smith). The administrative judge did not make any findings on these issues, nor did she make any credibility determinations to resolve the conflicting testimony. Because these matters are relevant to the ultimate issue of whether the appellant was sleeping "on duty," a necessary element of the charge, we remand for further findings, including credibility determinations, concerning whether the agency proved this charge. *See, e.g.*, *Rodriguez v. Department of Homeland Security*, 117 M.S.P.R. 188, ¶¶ 10-14 (2011) (canceling the appellant's removal when the agency did not prove a necessary element of the labeled charge, failing to report an accident involving a government owned vehicle, even though the "accident" element was not described in the supporting specifications); *Brott*, 116 M.S.P.R. 410, ¶¶ 10-11 (affirming the administrative judge's finding that the agency failed to prove all elements of the label of each charge).

¶7 Similarly, although the agency charged that the appellant's "absence from the floor jeopardized the safety [of] the patients charged to [his] care, and compromised the organization's mission to deliver safe patient care," IAF, Tab 5, Subtab 4D, when analyzing the charge, the administrative judge made no explicit findings regarding whether the appellant's sleeping endangered patients' safety.[3] On remand, the administrative judge shall make findings, including credibility determinations, regarding this aspect of the charge as well. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

[3] When analyzing the penalty, the administrative judge implicitly credited the deciding official's testimony that the appellant's conduct jeopardized patient safety. ID at 9-11. Whether the appellant was "on duty" when he fell asleep is also relevant to whether his conduct jeopardized patient safety.

If, on remand, the administrative judge sustains the agency's charge of sleeping on duty, she shall conduct a new analysis of the reasonableness of the penalty, including an analysis of the appellant's disparate penalty claim.

¶8 When not all of the charges are sustained, the Board will consider carefully whether the sustained charges merit the penalty imposed by the agency. *Reid v. Department of the Navy*, 118 M.S.P.R. 396, ¶ 24 (2012) (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981)). The Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Id.* In doing so, however, the Board may not disconnect its penalty determination from the agency's managerial will and primary discretion in disciplining employees. *Id.* (citing *Lachance v. Devall*, 178 F.3d 1246, 1258 (Fed. Cir. 1999)). In this case, the agency did not indicate that it desired a lesser penalty be imposed if only the charge of sleeping on duty was sustained. Nevertheless, for the following reasons, if the administrative judge sustains the sleeping on duty charge, further analysis is necessary concerning the reasonableness of the penalty.

¶9 Although the administrative judge upheld the penalty because she found that the deciding official gave clear and thorough reasons for his decision to remove the appellant, ID at 11, there remain several contested issues, not addressed in the initial decision, that are relevant in order to determine if the penalty was reasonable. The most important factor in assessing whether the agency's chosen penalty is within the tolerable bounds of reasonableness is the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities.[4] *Edwards v. U.S. Postal Service*, 116 M.S.P.R. 173, ¶ 14 (2010).

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[4] The administrative judge's findings regarding how long the appellant was absent from his duty station and whether he was on an authorized break for some portion of that time also will be relevant to the analysis of this factor.

¶10 One of the contested issues below was whether the appellant intended to fall asleep. The deciding official testified that he removed the appellant because he concluded that the appellant intended to sleep while on duty. HT1 at 109-110 (testimony of Mr. Smith). The deciding official also stated that he might not have proposed removal had the appellant unintentionally fallen asleep. *Id.* at 111-12. The appellant disputed that he took a break with the intention of falling asleep, and the record reflects that the appellant was sitting upright in a chair in an unoccupied patient room, directly across from the nurse's station, with the television on. *Id.* at 159-61, 164 (testimony of the appellant); *id.* at 49 (testimony of Mr. Henderson). The appellant's intent is relevant to an analysis of the seriousness of his behavior, particularly where, as here, the deciding official considered it in his determination of a proper penalty, but the administrative judge did not address or make any findings on this issue in the initial decision. *See Jinks v. Department of Veterans Affairs*, 106 M.S.P.R. 627, ¶ 17 (2007) ("In assessing the appropriateness of the agency's penalty selection, the most important factor is the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated."). In addition, the agency's Table of Penalties allows for a penalty of removal for a first offense of sleeping on duty when the "safety of patients, beneficiaries, members, employees or property may be endangered." IAF, Tab 5, Subtab 4O at 2. Otherwise, the maximum penalty for a first offense of sleeping on duty, without any element of endangering personal safety or property, is a reprimand. *Id.* An explicit finding on the issue of whether the appellant endangered the safety of people or property is also necessary to determine whether the penalty is reasonable. The administrative judge should address these issues on remand.

¶11 Furthermore, additional findings are necessary concerning the appellant's disparate penalty claim. The appellant's allegation that the agency treated him disparately compared to another employee, without a claim of prohibited

discrimination, is an allegation of disparate penalties to be proven by the appellant and considered by the Board in determining the reasonableness of the penalty, but it is not an affirmative defense. *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 5 (2010). The Board has held that, to establish disparate penalties, the appellant must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but [the Board] will not have hard and fast rules regarding the 'outcome determinative' nature of these factors." *Lewis*, 113 M.S.P.R. 657, ¶ 15; *see Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 20 (2012). If an appellant does so, the agency must then prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Boucher*, 118 M.S.P.R. 640, ¶ 20.

¶12 The appellant put forth evidence that a similarly-situated employee, also a health technician in the same unit, was given a 3-day suspension in 2008 for the charges of conduct unbecoming a federal employee, disrespectful conduct, and falling asleep while on duty. *See* IAF, Tab 15 at 78-79. With respect to the charge of falling asleep while on duty, the decision letter found that the employee had been asleep while sitting at a computer at the nurse's station. *Id.* at 79. When awakened, the employee apologized for sleeping and stated that he was "really tired." *Id.* Similarly, in this appeal, the appellant apologized to Mr. Henderson when he was awakened, and he explained that he was tired because of working overtime. HT1 at 50, 67-68 (testimony of Mr. Henderson), 161-63 (testimony of the appellant). Additionally, the other employee's first two charges of conduct unbecoming and disrespectful conduct concerned threatening behavior similar to the specifications underlying the appellant's charge of intimidating a fellow employee, which the administrative judge did not sustain. *Compare* IAF, Tab 15 at 78-79, *with* IAF, Tab 5, Subtab 4D; *see* HT1 at 116-20 (testimony of Mr. Smith).

¶13 There are also important differences between the other employee's matter and this appeal that could weigh in favor of a lesser penalty for the appellant. For instance, the decision letter in the other case stated that the employee had prior "disciplinary actions," whereas the appellant has no record of prior discipline. IAF, Tab 15 at 79; HT1 at 112 (testimony of Mr. Smith), 144-45 (testimony of the appellant). At the hearing, the deciding official testified that the difference in treatment was due to the fact that the appellant "deliberate[ly]" fell asleep, whereas the other employee "accidentally" fell asleep while at his work station. HT1 at 90-92 (testimony of Mr. Smith). The deciding official admitted, however, that it was possible that the appellant went to the patient room to read or sit and did not intend to fall asleep. *Id.* at 129-30. As discussed above, the administrative judge did not make a finding or any credibility determinations on this issue.

¶14 In fact, the initial decision did not mention any of the evidence concerning this purported comparator employee or explain why any of the similarities discussed above did not trigger the agency's burden to prove by preponderant evidence that there was a legitimate reason for the difference in treatment. We find that the deciding official's testimony that the appellant was removed for his offense of sleeping on duty because he deliberately fell asleep to be insufficient to distinguish the appellant's case and justify the difference between a 3-day suspension for the other employee and removal for the appellant. *See Boucher*, 118 M.S.P.R. 640, ¶¶ 20-24; *Villada v. U.S. Postal Service*, 115 M.S.P.R. 268, ¶¶ 10-12 (2010). Furthermore, an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and her legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler*, 1 M.S.P.R. at 589. As the hearing official, the administrative judge is in the best position to resolve these questions. *Wilson v. Department of Homeland Security*, 118 M.S.P.R. 62, ¶¶ 4, 7 (2012). Therefore, it is necessary to remand this appeal for further

analysis to resolve the question of whether the appellant was subjected to a disparate penalty and whether the agency met its corresponding burden to show a legitimate reason for the difference in treatment. *See Villada*, 115 M.S.P.R. 268, ¶ 12.

ORDER

¶15 For the forgoing reasons, we REMAND the appeal to the Northeastern Regional Office. The administrative judge shall issue a new initial decision that makes additional findings concerning the sleeping on duty charge and addresses the reasonableness of the removal penalty, including an analysis of the issues discussed above.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.